Advisory Opinion on Ballot Question 2:
"An Act Establishing A Sensible State Marijuana Policy"

To: Superintendents of Schools, Charter School Leaders, School Principals and Other Interested Parties

From: Mitchell D. Chester, Ed.D., Commissioner of Elementary and Secondary Education

Date: December 23, 2008

This advisory responds to questions the Department of Elementary and Secondary Education has received about Ballot Question 2, *An Act Establishing A Sensible State Marijuana Policy*, and its impact on public schools. Question 2, a ballot initiative law that the voters passed on November 4, 2008, decriminalizes the possession of one ounce or less of marijuana. The Attorney General has advised that Question 2 goes into effect 30 days after the Secretary of State's presentation of the election results to the Governor and Governor's Council, and their official determination that Question 2 has passed. The Governor's Council met on December 3, 2008 and certified the election results, which means that the new law will take effect on January 2, 2009. Until that time, the current law remains in effect and possession of any amount of marijuana is still a criminal offense in Massachusetts.

Question 2 replaces the criminal penalties for possession of one ounce or less of marijuana with a new system of civil penalties to be enforced by issuing citations, and excludes information regarding this civil offense from the state's criminal record information system. The text of Question 2 is available on-line at: http://www.sec.state.ma.us/ele/ele08/ballot_questions_08/quest_2.htm. For purposes of legal citation, Question 2 should be referred to as Chapter 387 of the Acts of 2008.

In our opinion, Question 2 does not affect the existing authority of school officials under state law and school committee policy to impose discipline, including suspension or expulsion, on students who possess one ounce or less of marijuana on school premises or at school-sponsored or school-related events.

State law authorizes but does not mandate school officials to suspend or expel students for possession of marijuana. We encourage school officials to use their authority under state law and school committee policy with discretion. Preferably, disciplinary measures should be coupled with drug awareness programs, and students should be given the opportunity to continue education in alternative settings when excluded from school for disciplinary reasons.

The following are questions we have received from school officials regarding the new law, and our answers to them. Since no court has yet addressed the proper interpretation of Question 2 or applied it to the public school context, this advisory reflects best

judgment based on the language of Question 2 and existing case law regarding public school discipline issues. Our legal staff has consulted with the Attorney General's Office, the Executive Office of Public Safety and Security, the Massachusetts Association of School Superintendents, the Massachusetts Association of School Committees, the Massachusetts School Nurse Organization, and the Massachusetts Interscholastic Athletic Association in preparing this advisory. If and when the Legislature or a court decision clarifies the applicability of Question 2 to public elementary and secondary schools, we will inform you.

Although we believe that our interpretation of Question 2 and its applicability to the public school context is reasonable and sound, we intend this advisory to be used as guidance and not legal advice. We recommend that school officials consult with their own legal counsel in regard to specific cases and situations that might implicate Question 2, especially because the law is new and untested.

1. **What are the primary components of Question 2?**

Question 2 amends Section 32L of M.G.L. c. 94C, the "Massachusetts Controlled Substances Act," by decriminalizing the possession of one ounce or less of marijuana. Possession of marijuana in such an amount remains illegal, but it may no longer be punished with a criminal penalty. Question 2 establishes the following civil penalties for possession of one ounce or less of marijuana:

- Offenders age 18 or older will be subject to forfeiture of the marijuana plus a civil penalty of $100.

- Offenders under the age of 18 will be subject to the same forfeiture and, if they complete a drug awareness program within one year of the offense, the same $100 penalty. The penalty for offenders under 18 who fail to complete such a program within one year can be increased to as much as $1,000, unless the offender shows an inability to pay, an inability to participate in such a program, or the unavailability of such a program. Such an offender's parents can also be held liable for the increased penalty. Failure by an offender under 17 to complete such a program can also be a basis for a delinquency proceeding.

2. **Will public schools be required to implement or enforce Question 2's civil penalties, including the required drug awareness program for offenders under age 18?**

No. Although Question 2 establishes a civil regulatory system that does not currently exist, it does not require public elementary and secondary schools to implement the new regulatory system or impose or enforce civil penalties under it. The drug awareness program contemplated by Question 2 must be developed by the state Department of Youth Services. State and local law enforcement officials must create a system for payment of the civil fines under Question 2 for possession of one ounce or less of

marijuana. The money received from the new civil penalties goes to the city or town where the offense occurred.

3. Will Question 2 affect the authority of school officials under M.G.L. c. 71, § 37H to suspend or expel students for possession of one ounce or less of marijuana?

In our opinion, the answer is no. Question 2 does not affect the existing authority of school officials under state law and school committee policy to impose discipline on students who possess one ounce or less of marijuana on school premises or at school-sponsored or school-related events.

Under current state law, a principal has authority to suspend or expel a student who is found on school premises or at school-sponsored or school-related events in possession of a controlled substance, including marijuana in any amount. M.G.L. c. 71, § 37H. Although Question 2 decriminalizes possession of one ounce or less of marijuana, marijuana in any amount will remain a controlled substance. Thus, school principals continue to have authority to prohibit possession of marijuana or any other controlled substance in any amount, and to impose consequences for possession of marijuana as a school discipline matter. The disciplinary actions (suspension or expulsion) that may be imposed under M.G.L. c. 71, § 37H result from marijuana's status as a controlled substance and not from the amount possessed by the student. Moreover, Question 2 prohibits criminal penalties, and student discipline is not a criminal penalty.

Question 2 further limits the Commonwealth and its political subdivisions from imposing "any form of penalty, sanction or disqualification" (other than the system of civil penalties that it establishes) for a person's possession of one ounce or less of marijuana. It makes no mention of student discipline; rather, it describes the types of civil penalties and disqualifications that may not be imposed as follows:

> By way of illustration rather than limitation, possession of one ounce or less of marijuana shall not provide a basis to deny an offender student financial aid, public housing or any form of public financial assistance, including unemployment benefits, to deny the right to operate a motor vehicle or to disqualify an offender from serving as a foster parent or adoptive parent. Information concerning the offense of possession of one ounce or less of marijuana shall not be deemed "criminal offender record information," "evaluative information," or "intelligence information" as those terms are defined in Section 167 of Chapter 6 of the General Laws and shall not be recorded in the Criminal Offender Record Information System.

Neither the language of Question 2 nor the explanation that accompanied the ballot question refers to student discipline or to the principal's authority under M.G.L. c. 71, §

37H. In our opinion, a disciplinary exclusion from school is not a "penalty, sanction or disqualification" as those terms are used in Question 2.

This is consistent with the stated purpose of Question 2 to decriminalize possession of one ounce or less of marijuana, thereby preventing both a conviction for the offense as well as a criminal record of the conviction. It is the criminal record of the conviction (known as Criminal Offender Record Information or "CORI") that has been used to deny certain government benefits and privileges, such as eligibility for public housing. This is not the case in the school discipline context. School disciplinary measures do not constitute or result in Criminal Offender Record Information. Moreover, a conviction for possession of one ounce or less of marijuana, which is a criminal misdemeanor under the current law, cannot be the basis on its own for a suspension or expulsion from school. (See no. 4, below). Thus, a school disciplinary measure, based solely on what will now be a violation of civil law, is not the type of "penalty, sanction or disqualification" that Question 2 was designed to limit or negate.

This interpretation of Question 2 is also consistent with the purpose and nature of public school disciplinary measures. Although no Massachusetts cases directly address this question, there is a strong argument that a school disciplinary measure for marijuana possession should not be considered a "penalty, sanction or disqualification" for purposes of Question 2. The disciplinary exclusion of a student for marijuana possession is a deterrent and a consequence to ensure the safety and health of the entire school population as well as the individual student. A public school disciplinary measure historically has not been considered a "civil penalty." Nothing in Question 2 indicates that it now should be considered one.

Finally, limiting the existing authority of school principals to discipline students for marijuana possession would be a major change that requires explicit statutory amendment. While Question 2 is explicit about eliminating criminal penalties and certain civil consequences that flow from a criminal conviction for possession of an ounce or less of marijuana, it says nothing about student discipline. For these reasons, we remain confident that Question 2 does not limit the authority of school officials to prohibit and take disciplinary action with respect to possession of marijuana in any amount at school or at a school-sponsored event.

4. Will Question 2 affect the authority of school officials to suspend or expel a student under M.G.L. c. 71, § 37H1/2 based on a criminal or juvenile delinquency complaint charging the student with a felony?

No. Under M.G.L. c. 71, § 37H1/2, school principals may suspend a student who has been charged with a felony through the issuance of either a criminal complaint or a juvenile delinquency complaint if the principal determines the student's continued presence in school would have a "substantial detrimental effect on the general welfare of the school." If a student is convicted under the complaint, the principal may expel the student using the same standard. The principal's authority under Section 37H1/2 does not

depend on whether the felony charge or conviction is based on an incident that occurred at school or at a school-sponsored event or activity.

As noted in no. 3 above, possession of one ounce or less of marijuana is a misdemeanor rather than a felony under the current law. Since Section 37H1/2 has not provided a basis for school officials to suspend or expel a student for a misdemeanor, the scope of Section 37H1/2, and school officials' authority to use it to suspend or expel students, are unaffected by Question 2.

5. **Will Question 2 limit the authority of school officials to discipline students for marijuana-related misconduct other than the possession of one ounce or less of marijuana?**

No. Question 2 does not affect school discipline or criminal or civil penalties for the sale, distribution, or use (smoking or other consumption) of marijuana or possession of marijuana in amounts greater than one ounce. Consistent with their district codes of conduct and school handbooks, public schools may continue to prohibit and impose disciplinary measures for these types of infractions, including contacting police or other law enforcement officials to report it as a criminal offense.

6. **If "possession" of marijuana for purposes of Question 2 includes having marijuana in one's body, may schools still disqualify students who appear to be under the influence of marijuana from participating in school activities and events?**

Yes. Question 2 defines possession of one ounce or less of marijuana as follows:

> Possession of one ounce or less of marijuana or tetrahydrocannabinol and having cannabinoids or cannibinoid metabolites in the urine, blood, saliva, sweat, hair, fingernails, toe nails or other tissue or fluid of the human body.

As the definition indicates, "possession" under Question 2 includes the more common meaning of possession – holding or having marijuana as one's personal property – as well as internal possession; i.e., having marijuana in one's body. This is relevant to school officials' authority to disqualify students who appear to be under the influence of marijuana from participating in school activities (including extra-curricular and athletic events) when the amount of marijuana that has been consumed is not known or is believed to be less than one ounce, whether or not the disqualification is part of a disciplinary measure.

The discussion in no. 3, above, explains our view that Question 2 does not affect the authority of school officials to discipline students who possess one ounce or less of marijuana on school premises or at school-sponsored or school-related events. If it does not prohibit disciplinary action as provided by statute, it certainly does not limit school

officials from protecting a student impaired by marijuana from possible harm to self or others. Any such interpretation of Question 2 would be overbroad and contrary to sound public policy. If a student is impaired or intoxicated by any substance, whether it is alcohol, marijuana or prescription medication, the school must act to ensure the safety of the student and others in the school community. If such action were challenged, we believe the school would prevail, especially if its action were based on the health and safety concerns resulting from the student's impairment rather than on the particular substance that caused the impairment.

7. Will Question 2 affect the authority of school officials to regulate educational, health and safety concerns related to students' marijuana use or consumption?

No. A public school must take reasonable steps to protect the health and safety of members of the school community and ensure the educational progress of its students. For health and safety reasons, as well as to ensure compliance with federal and state grant programs, schools must continue to implement their district substance use policies and procedures after the effective date of Question 2.

Question 2 explicitly does not limit the authority of local government officials to enact ordinances and bylaws regulating or prohibiting the consumption of marijuana in public places and penalizing the public use of marijuana. School officials might wish to consult with their city or town officials about such bylaws and regulations. Moreover, as part of their own policies, schools should continue to prohibit the possession or use of any amount of marijuana by anyone on school property. We would advise school personnel to refer to the school nurse for evaluation any student who appears to be inebriated, intoxicated or impaired by marijuana or any other substance, and contact the student's parent or guardian.

8. Will Question 2 affect the authority of the school committee to impose disciplinary exclusions under M.G.L. c. 76, §§ 16 and 17?

In our opinion the answer is no, for the reasons outlined above in the answer to no. 3. Under the procedures set forth in M.G.L. c. 76, §§ 16 and 17, the school committee may exclude a student from school for misconduct. Section 16 requires the school committee to provide the student "a written statement of the reasons" for the exclusion and Section 17 requires the school committee to provide the student "an opportunity to be heard" prior to a permanent exclusion (expulsion).

9. Will Question 2 affect the Massachusetts Interscholastic Athletic Association Rules regarding the use of marijuana by student-athletes who participate in interscholastic team sports?

All Massachusetts public high schools, as well as some private secondary schools, are members of the Massachusetts Interscholastic Athletic Association (MIAA) and sponsor sports teams that are governed by the MIAA's *Rules and Regulations Governing Athletics.* MIAA Rule 62 states that student-athletes who possess, use or consume

marijuana and other substances are temporarily ineligible to compete in interscholastic sports contests.

MIAA Rule 62 states, in relevant part:

> From the earliest fall practice date, to the conclusion of the academic year or final athletic event (whichever is latest), a student shall not, regardless of the quantity, use, consume possess, buy/sell, or give away any beverage containing alcohol; any tobacco product; marijuana; steroids; or any controlled substance . . . . This rule represents only a minimum standard upon which schools may develop more stringent requirements.
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> Minimum PENALTIES:
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> First violation: When the Principal confirms, following an opportunity for the student to be heard, that a violation occurred, the student shall lose eligibility for the next consecutive interscholastic contests totaling 25% of all interscholastic contests in that sport.
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> Second and subsequent violations: When the principal confirms, following an opportunity for the student to be heard, that a violation has occurred, the student shall lose eligibility for the next consecutive interscholastic contests totaling 60% of all interscholastic contests in that sport.

MIAA Rules and Regulations Governing Athletics at page 54.

For the reasons discussed in no. 3, above, in our opinion the "penalties" included in MIAA Rule 62 are not the type of "penalty, sanction or disqualification" that Question 2 limits. The MIAA eligibility rules are intended to ensure the safety and health of all the student-athletes on the team as well as their competitors. Nothing in Question 2 indicates that it is intended to bar such rules with respect to student-athletes who possess one ounce or less of marijuana either within their bodies or externally. Such an interpretation of Question 2 would expose students and others in the school community to health and safety risks, and for that reason we do not believe that a court would uphold it. The intent and scope of Question 2 may be further clarified by the Legislature or by a court decision. We will promptly inform you of any such clarification.